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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 434.

J. CONGDON SEABURY, AS RECEIVER OF THE CITY NATIONAL BANK OF SUMTER, S. C., A NATIONAL BANKING ASSOCIATION,
APPELLANT,

against

BEATRICE C. GREEN, ADMINISTRATRIX D. B. N., C. T. A., OF THE ESTATE OF MOSES GREEN, DECEASED, ET AL., RESPONDENTS.

BRIEF ON BEHALF OF RESPONDENTS.

NO FEDERAL QUESTION INVOLVED.

(A)

STATUTORY QUESTION.

To sustain the jurisdiction of this Court, appellant takes the position that in denying him relief below, the Supreme Court of South Carolina construed and applied a federal statute, to-wit, the statute imposing the extra

liability upon stockholders of national banks; and that by such construction and application it deprived him of a judgment to which, under the statute, he is entitled.

The statute is quoted on page 10 of appellant's petition for the writ.

As applied to the present case, the appellant's position is, in effect, that the State Court did one or both of the only two things that could involve a construction or application of the statute in question, to-wit: (1) decided who is the stockholder liable in this case; and/or (2) exempted from liability under the statute a person found to be a stockholder, or who should have been found as such.

On the first point, appellant and respondent are in accord that the stockholder was the decedent, and is now the representative of the decedent. This representative is the administratrix, c. t. a., d. b. n., respondent here. Hence there is no ground of appeal on this score.

On the second point, bearing in mind the dual (legal and equitable) character of the proceeding, the South Carolina Supreme Court should not be taken to have decreed that by reason of the above situation, the liability cannot be enforced. No contest is made as to the propriety of the appointment of the administratrix, so that suit for the liability may be brought, and there is in this Court no contention that a judgment may not be rendered against the administratrix for the purpose of reaching undistributed assets that may ultimately be discovered.

The ultimate question involved in this case appears to be one relating to the character of title to property which comes into the possession of devisees after the testator's death, and after the testator's estate has been wound up. Is any federal question involved in the declaration of state policy that titles are not affected by contingent liabilities of the testator which are not provable, and, indeed, have not accrued in the remotest sense at the time of the testator's death or at any time during

the period of administration of the testator's estate? The question is answered by the decision of this Court in the case of *Matteson* v. *Dent,* 176 U. S. 521, 529-30. In that case it was expressly held that the question whether the distribution of the estate of a decedent who had owned stock in a national bank which closed after the distribution of the estate and the allotment of the stock to the next of kin, is "wholly dependent" on the law of the state in which the question arises.

That case arose in the State of Minnesota. The law of that state (quoting from the opinion of this Court, p. 530), "as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question".

And this court goes on to say that this consideration demonstrates that no substantial federal question is involved, except for another position taken by appellant in that case, which is not pertinent here.

There is no governing statute on the subject in South Carolina. The law of the case, however, can be made with equal force by the State Supreme Court, as was done here.

It is not doubted that Congress would have the power to cover the present situation with a federal statute similar to the Minnesota law above referred to, so as to create uniformity in the imposition of the liability in question. But as the law now stands, the matter is one which Congress has not seen fit to deal with, leaving the field entirely open for the application of the law of the state in which the question arises.

Appellant places great emphasis on the fact that the result of the holding of the South Carolina Supreme Court in this case is the creation of a situation in which the extra statutory liability attaching to the stock in

question under the federal statute is lost. That would not be true under respondents' theory, which would entitle the appellant to enforce the liability against any assets of the estate that might be available for administration in the future.

And it is to be borne in mind that the present situation does not arise, fundamentally, from any hiatus in the law. In view of the fact that the infants were incapacitated under the law to take the stock, the delivery of the stock by the executor to them was an unfortunate mistake on the part of the executor. The law did not require him to adopt an interpretation of the will which involved the doing of an abortive act. He could have sold the stock and delivered the proceeds to the children. Had he done so, he would not have violated the true spirit of any specific direction of the testator, and, on the other hand, would have maintained the status contemplated by law, to-wit: the ownership of the stock by a person legally competent to take the same, and to assume the contractual liability attached thereto.

On principle, the situation here presented is not unlike that followed in the case of *Williams* v. *Cobb*, 242 U. S. 307, where, under somewhat similar circumstances, it was held that neither the testator's estate, nor the testator's legatees and devisees, could be held liable, when it became apparent that the transfer of national bank stock owned by the decedent had been made to trustees who did not have the legal power to take the stock.

On the issue whether a federal question is involved, it is, of course, wholly immaterial whether the liability on the stock is actually collectible. It is sufficient that the decision of the South Carolina Supreme Court has avoided any construction of the federal statute by holding in legal effect (in accord with the decisions of this Court) that the infants are not liable; and that while the property of the testator in the hands of his legatees and devisees cannot, under the present circumstances, be followed, the administratrix, c. t. a., d. b. n., stands in the shoes of the

testator. There is also in the decision the plain intimation that (as in the case of *Williams* v. *Cobb, supra*) the problem now presented arises not from any hiatus in the law, but from the acts of persons who created the present problem by improvidently dealing with the stock in a manner not authorized by law. So that the decision of the State Supreme Court does not, as suggested by appellant, amount to a holding that the liability attaching to the stock has been destroyed by the decision below, but, on the other hand, suggests, by inference, at least two sources to which the Comptroller of the Currency may look, if he desires to right the legal wrong that has been done. That is to say, he can get his judgment against the administratrix, c. t. a., d. b. n., if he concludes that there is any reasonable probability that assets will come into her hands in the future. Or he can resort to the executor whose act in transferring the stock to the infants, when he should have distributed the same to the adults (and substituted other property therefor), or sold the same and distributed the proceeds, is the cause of the predicament in which the appellant now finds himself.

If the view of respondents that the question here presented is wholly one of State law (involving the status of title to real estate of a decedent) is considered too limited, at least it would appear that in all events the decision of the South Carolina Supreme Court can as well be said to rest on that ground, as upon the ground of a construction of a federal statute. At most the judgment of the lower court can be said to rest on two grounds, one involving (according to appellant) the construction of a federal statute, and the other a question of State law and State policy in respect to the devolution of title to property. In either of these views, or if it appears to the Court that there is uncertainty as to the ground upon which the judgment below was based, this Court will not entertain jurisdiction. *Lynch, et al., Commissioners,* v. *New York,* decided October term, 1934, by this Court.

(B)

CONSTITUTIONAL QUESTION.

In the memorandum on behalf of respondents on the petition for a writ of *certiorari*, it is stated (page 6) that the constitutional question presented by appellant (to-wit, that the appellant was deprived of property without due process of law, by reason of the action of the South Carolina Supreme Court in reversing the judgment as to the adult defendants who did not appeal) was first made in this Court, and that, therefore, the point is not properly before the Court. Appellant's counsel apparently contends that this point was made below by the statement in italics near the top of page 8 of his brief, as follows:

> "The attorney for the appellants does not represent the adult defendants in this cause, therefore, this exception (i. e.) relating to the real estate in the hands of the adult devisees, cannot affect the rights of the respondent as to them."

And the appellant may also be relying on his statement on page 7 of his brief below, in which he says that the failure of the adult defendants to appeal from the judgment rendered against them in the court of original jurisdiction, makes the said judgment *res adjudicata* as to them.

Respondent's counsel does not think that these bare statements raise any constitutional question, but that the same were taken by the Court below as merely a statement of fact on behalf of the present appellant to emphasize that counsel for the respondents here does not represent the adult heirs.

Of course, in his argument below, there was no occasion for appellant's counsel to raise any constitutional issue, for the decision in the first instance was in his favor, and he probably did not anticipate the possibility

of a ruling against the non-appealing adults, but in his petition for a rehearing in the Court below, a distinct opportunity was presented for raising the constitutional issue now relied upon, and there is no suggestion in the record that in such petition any constitutional or other federal question was raised in the South Carolina Supreme Court.

But in any event the fact is that the non-appealing adult heirs were fully represented in the South Carolina Supreme Court. The present respondent, the administratrix, c. t. a., d. b. n., was the representative of the testator's estate, and of any persons against whom liability could be asserted through the estate. And in that capacity the respondent vigorously asserted before the South Carolina Supreme Court the contention of non-liability on behalf of the adult heirs.

This must have been the view of the matter taken by the Court below. And since the adult heirs, who did not individually appeal, filed a brief in the lower Court (which brief was adopted by the present appellant as a part of his own argument), it is clear that in any aspect of the case the adult heirs were represented in the lower Court in the same manner and form, and with the same result, as if they had actually appealed.

The State Supreme Court took the view that under the South Carolina law and practice, it had the power to deal with all of the issues presented by the appeal, and to finally dispose of the same as to all interested parties. In so holding, the Court did not infringe any constitutional principle.

King v. *West Virginia*, 216 U. S. 92;
Moss v. *Rainey*, 239 U. S. 538;
John v. *Paullin*, 231 U. S. 583.

Issues on the Merits.

Much of appellant's argument in this Court deals with legal propositions that are not in dispute.

Counsel are in agreement that the transfer of the stock to the infants imposed no liability upon them; that if the bank had closed either before the death of the testator, or after his death, but before his estate was wound up, the estate, or the assets thereof in the hands of the devisees, would have been liable; that even though the bank closed after the death of the testator, and after the winding up of his estate, the assets of the estate in the hands of the heirs and devisees would have been liable, if there had been any element of fraud or collusion, such as was presented in the case of *Luce* v. *Thompson,* and other authorities relied upon by the appellant; also that, if the stock had been delivered to the adult legatees, and they had failed to have the same transferred upon the books of the bank, they could not (even though the bank did not close until after the estate had been wound up) escape liability. See *Matteson* v. *Dent,* 176 U. S. 521.

In the present case, the situation is exactly what it would have been if the stock had remained in the name of the testator. The bank remained open for more than five years after the testator died, and for about four years after his estate was distributed, and the sole question is whether or not, under such circumstances, in the absence of any element of fraud, the Receiver is entitled to follow the assets of the estate in the hands of the devisees and legatees, especially in view of the fact that the difficulty of collection is due alone to the act of the executor in making an improper distribution of the stock, and the inadvertent action of the bank itself in permitting the transfer to be made.

The decisions of the South Carolina Supreme Court relating to the enforcement of an obligation of the decedent against the assets of the estate in the hands of his devisees and legatees, cited by appellant, are wholly in-

applicable to the present case. They relate to obligations of the decedent, which had accrued and were known at the time of the testator's death. This construction of those cases is expressly set forth by the South Carolina Supreme Court in the opinion rendered in the present cause.

And it is readily perceived that the obligation attaching to bank stock is not of the character of the obligations contemplated by the decisions in speaking of the liability of a decedent's estate (in the absence of statutes of the character involved in the case of *Matteson* v. *Dent*).

There must be some point at which the contingency of the extra liability attaching to the ownership of bank stock is abated as a claim against property formerly owned by the owner of the stock, when such owner dies. In this case, the bank remained open for nearly five years after the testator's estate was completely wound up. In other cases the bank might remain open for many years under a similar state of facts. Is the title to the real estate taken by the testator's devisees of so infirm a character that they may not safely deal with it as their own for fear that the property, or its proceeds, may at some future date be impounded, in the uncertain event of the closing of the bank?

It is earnestly submitted that while the liability attaching to the ownership of bank stock is admittedly contractual, it is nevertheless so inchoate in character and so far beyond the control and knowledge and foresight of the owner of the stock (prior to the failure of the bank) as not to be either (1) a provable claim against a decedent's estate, or (2) a contingent liability for which the executor may be required or expected to make provision, or (3) a contingent liability, which the testator's devisees should anticipate as one that they may be called upon to pay in the changed circumstances that will arise if they expend money in improving the property or sell it and invest or use the proceeds.

As hereinbefore suggested, the ultimate question involved in this case appears to be one relating to the

character of title to property which comes into the possession of devisees after the testator's death, and after the testator's estate has been wound up.

In form, the decree of the Supreme Court of South Carolina denies to the appellant the right to a judgment in this case. In legal effect, however, the opinion of the Supreme Court amounts to no more than a declaration that the appellant is not entitled, as he claimed to be, to enforce his claim, (1) primarily against the property which the infants received under the will of the donor of the stock, or generally against (2) the property which the adult and infant devisees received under the will.

There being no suggestion that the administratrix appointed for the purposes of the present suit had in her hands any assets of the estate, or that there was any possibility of her obtaining such assets in the future from hitherto unexplored sources, the entry of judgment against her would have been an empty formality, in view of the further ruling of the Court that the property now in the hands of the devisees may not be subjected to the payment of appellant's claim. It will be observed that (as permitted under the Code practice prevailing in South Carolina) the appellant did not merely bring an action to recover a judgment for the alleged debt. He brought a combined legal and equitable proceeding; legal in the sense that he sought an adjudication of the indebtedness; equitable to the extent that he made his complaint a creditor's bill to subject the real estate in the hands of the devisees to the payment of his claim.

Had the appellant suggested to the Court that he desired merely an adjudication of the indebtedness, to be enforced against any property of the estate that may in the future come into the hands of the administratrix, or of her successor, he would have been entitled to such judgment, and respondents concede that in this Court, even in the present proceeding, their resistance of the appellant's claim should not go to the point of denying

the right to such judgment, if the appellant's contention that he is entitled to enforce the same against property which has already passed into the possession of the testator's devisees and legatees is subject to be impounded is not made a part of the judgment.

* * * * * *

If it should be the view of this Court that the assets of the testator in the hands of his legatees and devisees can be followed under the circumstances of this case, but that the liability here asserted is collectible as against all of the legatees and devisees (adults and infants alike) according to the proportionate interests of the testator's estate received by them under the will, and that the Receiver is not entitled to collect the whole of the liability out of the testator's estate that went into the hands of the infants, it is respectfully suggested that in such event this holding should be specifically declared. It is the understanding of respondents that appellant not only seeks to establish the liability in question as one enforceable against the distributed assets of the testator, but also that it is one that, in his discretion, he can enforce primarily against the infants alone. The Receiver's contentions in this regard are apparently founded on his view that since the adult devisees and legatees received other stock of the bank in question from the testator's estate, and paid their liability thereon, they should not now be required to even contribute to the liability attaching to the four shares now in question.

But the Receiver overlooks the fact that when the adult heirs received the shares of stock allotted to them and had the same transferred on the books of the bank to their own names, all questions as to the ownership of the stock and as to liability for the extra assessment was removed, as far as that stock was concerned. Having become record owners of the stock, with capacity to take the

same, and having obtained the benefits of such ownership for a period of several years before the bank closed, it is not perceived how the fact that they paid the extra liability on the stock so allotted to them, can have any bearing on the issue as to whether the infants should be held liable on bank stock improperly allotted to them. In effect, the adult heirs (with the support of the Receiver) ask the Court to rule that the estate which the infants received from the testator shall be depleted for the purpose of exonerating other persons, who, under a proper administration of the estate, would have become the owners of the stock, and subject to the liability attached thereto.

Respectfully submitted,

SAMUEL WANT,
Attorney for Respondents.

Darlington, S. C., December 3rd, 1934.